IN THE SUPREME COURT OF THE UNITED STATES.

THOMAS P. QUEENAN,
Plaintiff in Error,
vs.
TERRITORY OF OKLAHOMA
Defendant in Error

Now comes Thomas P. Queenan, Plaintiff in Error, and says that in the Record and proceedings in the above entitled cause there is manifest error and respectfully presents the following as his Assignment of Errors, to-wit:

First: The Court erred in affirming the action and Judgment of the Honorable District Court. And erred in denying the petition of Plaintiff in Error for a re-hearing of said cause.

Second: The Court erred in holding that the opinion of non expert witnesses as to the mental condition should be confined to the opinion formed before the homicide; and erred in not passing upon the ruling of the Honorable Trial Court on this question as made when refusing to hear the testimony of the witness John H. Beatty. The Trial Court held it incompetent for the witness to express (at the time of the trial) his opinion then as to what was the mental condition of Plaintiff in Error immediately prior to the homicide; and by its ruling forestalled enquiry into this matter by forbidding the witness to state any opinion formed since the homicide. See Record 476 to 480. Printed Record 22.

Third: The Court erred in holding the following instruction to be the law, to-wit:—

"Homicide committed by one who has not sufficient knowledge and understanding to understand right from wrong, and to comprehend and understand the consequences of his act, is excusable for any act in reference to

which his mind is in weakened condition. But it is not every derangement of the mind that will excuse one for the commission of crime. If one has sufficient mind and understanding to know right from wrong regarding the particular act, the law recognizes him as sane, and holds him responsible for such act, and in this connection, if you should find beyond a reasonable doubt that the defendant took the life of Ella Queenan, as charged in the indictment, and that at the time of such homicide he knew and understood that it was wrong to take her life, and was able to comprehend and understand the consequences of such act, then in that event, it will be your duty to find the defendant guilty of murder, as charged in the indictment. But, on the other hand, if you should find that he was not able to know that the act of taking her life was wrongful, and was not able to comprehend and understand the consequences of such act, then you should find the defendant not guilty."

Fourth: The Court erred in sustaining the Honorable Trial Court in refusing the following Special Instructions asked by Plaintiff in Error, to-wit:

No. 3. "If from a consideration of all the evidence you entertain a reasonable doubt as to whether or not the mind of the defendant at the time he shot and killed Ella Queenan, if you believe from the evidence beyond a reasonable doubt that he did shoot and kill Ella Queenan, was so affected by insanity as to render him unable to distinguish between right and wrong or to know that his act was wrong you should acquit him."

No. 4½. "A person partially deprived of reason is incapable of committing crime if at the time of committing the wrongful act he is incapable of knowing its wrongfulness, and the jury cannot return a verdict of guilty in this case unless they believe from the evidence, and to the exclusion of every reasonable doubt, that at the time the act was committed the defendant was so fully possessed of his reason as to know the wrongfulness of his conduct."

Fifth: The Court erred in holding that the petit juror, J. F. Harper, was a qualified juror. The juror Harper had been convicted of a felony, for which crime he had served a term of imprisonment in the state pententiary of Nebraska; but his disqualification was not discovered until the testimony in chief of the Territory was in and much of that of the Defendant. Having been convicted of a

felony he was incompetent under the law and his verdict a nullity.

Sixth: The Court erred in holding that the Plaintiff in Error waived the disqualification of the juror Harper.

Wherefore, the said Thomas P. Queenan prays that the Order of said Supreme Court of the Territory of Oklahoma be reversed and said cause remanded for further proceedings and the correction of said Errors.

THOMAS P. QUEENAN,
Plaintiff in Error.

By J. W. JOHNSON,
C. B. AMES,
STILLWELL H. RUSSELL,
H. H. HOWARD,
his Attorneys.

In the Supreme Court of the United States,

October Term, 1902.

THOMAS P. QUEENAN,
Plaintiff in Error,

vs.

TERRITORY OF OKLAHOMA,
Defendant in Error.

No. 246.

Error to the Supreme Court

OF THE

Territory of Oklahoma.

STATEMENT.

The plaintiff in error, on January 27, 1900, shot and killed his wife. They had been married four or five years, and had one child, a girl three or four years old. Their place of residence at the time was upstairs in a two-story frame business building. He returned home at about the noon hour, and within a few moments after his arrival fired the shot. The shooting occurred in the kitchen where she was preparing the midday meal. No witness was present. He then leaped through the closed window, carrying broken glass and a part of the sash with him to the ground, where he was found disabled with the empty pistol near by. Their relations were and at all times had been affectionate. He was of a kindly and inoffensive disposition, never having done or offered violence to any one.

No motive appears for the act, and no explanation, except it be found in his mental condition. He was convicted and the death penalty pronounced against him. Insanity was the only defense. Several errors are assigned.

I.

John H. Beaty, attorney, was called as a witness for defendant. His testimony is found, commencing at page 476 of the record, and page 22 of the printed record. He testifies to a long and intimate acquaintance with defendant and to his conduct shortly preceding the homicide, but says that at the time of observing the conduct he formed no opinion as to the sanity of defendant. Having later recalled this conduct he formed an opinion which he is asked to express. No objection is made that the facts are not sufficiently stated by the witness, or that the facts stated are not sufficient upon which to base an opinion. The objection is as to the competency of the testimony, because the witness is asked for his opinion at the time of testifying as to the mental condition of the defendant at the time his conduct was observed. And the court holds that it "is incompetent for the purpose of this trial," to which an exception is taken. Page 24.

That a non-expert, after stating the facts upon which it is based, may give his opinion as to mental condition seems generally to be accepted, and is held by this court.

Life Ins. Co., v. Lathrop, 28 U. S. L. ed., 536.

And this opinion must be that of the witness at the time of his examination.

Runyan v. Price, 15 Ohio S., 1.

And the fact that the witness did not form his opinion at the time he observed the facts on which it is based, but afterwards, does not effect its competency.

Buswell on Insanity, Sec. 246, citing
Hathaway v. Life Ins. Co., 48 Vt., 335.

It is held to be the correct practice to call for the opinion of the witness at the time of the delivery of his testimony for the reason that subsequent consideration and reflection may have changed an opinion formed at the time the facts were observed by him. Runyan v. Price (Supra): 86 Am. Dec., 468. Clevenger, Med. Juris. Vol. 1, 589.

An expert, as a rule, forms his opinions from facts related, while a non-expert forms his from a personal knowledge of the facts, and in this distinction is found the only limitation governing the admissibility of the opinions of the two classes.

It is immaterial when an expert forms his opinion, but it is material that the opinion testified to must be the one entertained at the time of the trial, and why not apply the same rule to a non-expert? Why should the time when it is formed be the test with the one and not with the other?

The prime inquiry is, has the non-expert a personal acquaintance with the facts upon which he has formed the opinion? Observation establishes his right to the opinion and it becomes evidence within certain limitations, its competency being judged by its pertinency to the facts stated by him.

An opinion is but a conclusion arrived at from an ascertained condition, and expressed by one who has had opportunities of observation becomes the statement of a fact. Ins. Co. vs. Lathrop, 111 U. S., 537.

An opinion necessarily springs from an antecedent condition and when permitted expression, it must be an opinion of the present.

The Court will observe that the conclusions were the same, but an opinion formed at the time could have changed. The tree does not fall from the blossom but the blossom from the tree. The facts do not spring from the opinion but the opinion from the facts. The facts being unchanged, what difference when the conclusion from them is reached, so it be adhered to at the time it is to become evidence?

A conclusion may never be reached or it might be the product of reflection and consideration and if it should be, is time when it ripens the test, or is it not safer and more reasonable to ascertain that it is an opinion of the present based upon a pre-existing knowledge of facts that give it credence as an inference correctly drawn?

Suppose the witness Beaty had answered that at the time he observed the facts he formed an opinion, but that reflection had changed it, which of the two would be recognized as competent? Or when he observed the facts he formed the opinion that Plaintiff in Error was crazy, but his present opinion from the same

facts was that he was not, would it be competent to force the witness to foreswear himself and make evidence out of that which had become obsolete? We think not.

Suppose a juror on his *voir dire* should answer that when the merits of the case were related to him he did not form an opinion, but that subsequent reflection had produced a fixed opinion, would he be a competent juror? He would be under the ruling complained of.

The witness Beaty was among the last who observed the conduct of Plaintiff in Error. His opinion of that conduct was both material and pertinent, as such evidence is never regarded as cumulative. Its rejection was hurtful, because the jury was confronted with a witness whose acquaintance with and observation of Plaintiff in Error would render any conclusion reached by him of the same dignity as a statement of a fact.

II.

The fifth instruction, found at page 651 of the record, printed page 25, is assigned as error. The portion particularly complained of is the following: "But, on the other hand, if you should find that he was not able to know that the act of taking her life was wrongful, and was not able to comprehend and understand the consequences of such act, then you should find the defendant not guilty."

This, it seems to us, charges the jury that, in order to acquit, they shall find not only that he did not know the wrongfulness of the act, but also that he was unable to comprehend and understand its consequences.

By Section 1852 of the Oklahoma Statutes of 1893, it is provided:

> "All persons are capable of committing crimes, except * * * * * lunatics, insane persons, and all persons of unsound mind, including persons temporarily or partially deprived of reason, upon proof that at the time of committing the act charged against them they were incapable of knowing its wrongfulness."

The only statutory test is his inability to know the wrongfulness of the act: the instruction enlarges the disability to a want

of capacity to comprehend and understand its consequences; that is, before acquitting him, it must appear to the jury not simply that he did not know the wrongfulness of the act, but also that he was unable to understand its consequences. And how far into the consequences he must be unable to see, as the jury would understand the language used, we could only know by inquiring of them. Did they understand that he must be unable to comprehend the mere physical consequence, as that death would follow the shooting; or the mere legal consequence, as that arrest and punishment would follow? Most likely not more than this, and if so, we submit that according to the history of insane acts, the maniac usually understands, or knows, this and more, often laying his plans with care and calculating the consequences with correctness, seldom seeking to escape, frequently seeking to procure the most natural consequences, being unable to know the wrongfulness of the act causing them, or deluded into the belief that the act is rightful and the consequences beneficial.

We think this is an enlargement of the mental incapacity provided by the Statute, and so worded as to be prejudicial to the defendant.

The objectionable instruction in full is as follows:

"Homi committed by one who has not sufficient knowledge and understanding to understand right from wrong, and to comprehend and understand the consequences of his act, is excusable for any act in reference to which his mind is in weakened condition. But it is not every derangement of the mind that will excuse one for the commission of crime. If one has sufficient mind and understanding to know right from wrong regarding the particular act, the law recognizes him as sane, and holds him responsible for such act, and in this connection, if you should find beyond a reasonable doubt that the defendant took the life of Ella Queenan, as charged in the indictment, and that at the time of such homicide he knew and understood that it was wrong to take her life, and was able to comprehend and understand the consequences of such act, then in that event, it will be your duty to find the defendant guilty of murder, as charged in the indictment. But, on the other hand, if you should find that he was not able to know that the act of taking her life was wrongful, and was not able to comprehend and understand the consequences of such act, then you should find the defendant not guilty."

In the opinion affirming this case the Supreme Court of the Territory holds that the instruction fairly states the law and comes within the rule announced by it in Mass. vs. Territory, 63 Pac., 961, notwithstanding the rule announced in that case is as here given:

"But no matter what the condition of a defendant's mind at the time of committing an act which the Statute declares to be criminal, he can only be excused, where his defense is lunacy, insanity or unsoundness of mind, upon proof that he was incapable of knowing its wrongfulness."

We do not take issue with the rule as announced, as it is the language of the Statute and is in keeping with the humanity of the law declared by this Court, but we do take issue with the suggestion, "that the incapacity to know the wrongfulness of an act embraces necessarily the incapacity to understand the nature and consequences of the same." The conditions are not convertible.

That they are not so is recognized by the decisions of this Court.

Ins. Co. vs. Terry., 15 Wall, 581,
Clevenger. Med. Jur. Insan. Vol. 1 p. 410 S. 6.
Ritter vs. Life Ins. Co., 169 U. S., 149-150.

The law requires that an accused be ignorant of the character of the act as a crime and not an ignorance of the mere act itself. He could know that he was taking the life and with sufficient intelligence to employ the necessary weapon to accomplish his purpose, and at the same time be unconscious that he was committing a crime. His darkened mind may not have enabled him to appreciate the moral consequences of his act, yet having capacity enough to understand its physical nature.

Bigelow vs. Ins. Co. 3rd, Otto., 228.

The Honorable Trial Court's instructions in effect say:

"Gentlemen of the jury, while you may believe from the evidence that defendant at the act was not capable of understanding its wrongfulness, yet, if he had capacity to understand the probable consequences of the act, you should convict him."

A mind so far bankrupt as to be unable to know the wrongfulness of an act, and unable to comprehend and understand the physical consequences or effect of the act, is reduced to such extremity as to make an act no more the act of such a mind, in the sense of the law, than if impelled by irresistible physical power. Ins. Co. vs. Broughton, 109 U. S., 131.

An insurance company cannot as a condition precedent to the payment of a policy upon the life of an assured who has taken his own life, require it to be shown that at the time of the act he was incapable of knowing its wrongfulness and incapable of understanding the consequences of it, for the reason that if the intellect is thus distressed it would be so far bereft of reason that the act would be no more his act in the sense of the law than that of the instrument used when committing it.

Ins. Co. vs. Broughton, 109 U. S. 131.
Ins. Co. vs. Rodel, 95 U. S. 241.
Ins. Co. vs Terry, 15 Wallace, 581.
Ins. Co. vs. Akens, 150 U. S., 473.

Plaintiff in Error excepted to the instructions of the Court and submitted three special instructions, two of which, Nos. 3 and 4½, Record page 29, are as follows:

No. 3. "If from a consideration of all the evidence you entertain a reasonable doubt as to whether or not the mind of the defendant at the time he shot and killed Ella Queenan, if you believe from the evidence beyond a reasonable doubt that he did shoot and kill Ella Queenan, was so affected by insanity as to render him unable to distinguish between right and wrong or to know that his act was wrong you should acquit him."

No. 4½. "A person partially deprived of reason is incapable of committing crime if at the time of committing the wrongful act he is incapable of knowing its wrongfulness, and the jury cannot return a verdict of guilty in this case unless they believe from the evidence, and to the exclusion of every reasonable doubt, that at the time the act was committed the defendant was so fully possessed of his reason as to know the wrongfulness of his conduct."

The requested instructions state the law applicable and draw

the attention of the Honorable Trial Judge to the essential distinction between those given and those refused.

Pierce vs. Trav. Ins. Co., 34 Wis., 389,
Waters vs. Ins. Co., 2 Fed. Rep., 892.

If an assured when killing himself understood at the time the physical consequences but was incapable of knowing the wrongfulness of the act, would be too irresponsible to defeat a recovery upon his policy, how does it vary the rule if in the same state of mind he killed his wife?

Inmates of a lunatic asylum often kill their keepers, not knowing the moral wrong, but understanding the consequences will be death to the keeper and escape for themselves.

Madmen have no faculties that are capable of appreciating the moral aspect of any act, but there are faculties left to them in the mysterious matter from which there comes thought and make them the "cunningest patterns of excelling nature," and none are more conscious of the ruin wrought.

The instructions were hurtful and easily understood by the jury when what was said by Plaintiff in Error just preceding and said and done by him immediately subsequent to the shooting is for a moment considered. A witness testified to what was said by the husband and wife a few minutes before the shooting. Pages 326, 329, 336, 340. Then came the fact that Plaintiff in Error jumped from a second story through the glass to the pavement and when seen writhing and groaning, in reply to the question if he was hurt, said that he had shot his wife and child. In view of what was said and done by Plaintiff in Error, it was easy for the jury to believe he understood what he had done and was, therefore, able to understand the consequences of his act, and at the same time believe that he did not know its wrongfulness.

The distinction between the conditions of the mind that could foresee the consequences or have knowledge of them and the capacity to know whether it was right or wrong, was evidently made an issue at the trial, else why refuse the requested instructions on that point and iterate and re-iterate the contrary in those given by the Court?

III.

One of the jurors, J. F. Harper, was convicted of grand larceny in Pawnee County, State of Nebraska, on September 21, 1881, and sentenced to and served in the penitentiary of that State for a term of fifteen months. The record is found at pages 669 to 675, and in printed record at pages 33 to 37. On his voir dire he twice answered that he had never been convicted of a felony under the laws of the United States or any State or Territory. Record pages 234 and 227, and printed pages 7 and 12.

After the testimony in chief for the Territory and that of the greater number of the witnesses for the defendant was in, the Court in a manner not disclosed by the record was advised of the juror's disqualification, and communicated the information to the attorneys for the respective parties, neither of whom had any information on the subject before. The Court then caused the jury to retire and the attorneys retained for the prosecution gave formal notice of the fact to the attorneys for the defendant, that they might examine "into the matter for the purpose of challenging the juror for cause." The defendant said and did nothing.

The court then observed that the facts were not before him in such a way that he could act upon them, but expressed the opinion that if either party should properly present the facts and challenge the juror there would be ground for excusing him.

With this the trial proceeded. Record page 456, Printed pages 12 and 13.

1. Was the juror subject to challenge at the time?

"When twelve men are called as jurors, the defendant must be informed by the court or under his direction, of his right to challenge the jurors, and he must do so before the jury is sworn to try the cause."

Okla. S. Sec. 5157.

"It must be taken when the jury is full and as soon as one person is removed by challenge, another must be put in his place until the challenges are exhausted or waived. The court for good cause shown may permit a juror to be challenged after he is sworn to try the cause, *but not after the testimony has been partially heard.*

Okla. S. Sec. 5177.

If there is virtue in these provisions of the Statutes, it seems to us that the suggestion of court and counsel related to a matter which we had no right to demand and the court had no power to grant.

And it cannot be put in answer that the challenge could have gone to the panel, for that "is an objection made to all the trial jurors returned," and "must be taken before a juror is sworn."

Okla. S. Sec. 5166 and 5168.

These sections of the Statutes seem to be purely declaratory. There is, however, a departure in the manner of swearing the jurors. Originally it was the practice to swear each juror separately as he was called, qualified, passed and accepted by the parties. And "after he had touched the book, by authority of the court, it was too late to challenge him for either cause or favor, or peremptorily."

In some of our courts, as in Oklahoma, this rule has been relaxed in so far as to allow a challenge for cause after the jury has been sworn, but before testimony has been taken. And by statute in some places the court is authorized to use the remaining jurors in forming a new jury in case of a mistrial. This modification seems to arise out of and be limited by a substantial reason: the challenge is allowed after the oath has been administered and before the testimony is taken "for good cause shown" as a matter of substantial economy without material injury "particularly if the cause or favor could have been made the ground for a new trial."

United States v. Davis, 103 Fed., 457.

2. Did the defendant forfeit his rights by failing to act?

It would seem to us that if the juror was not subject to challenge at the time of discovering his disqualification, it would be charging the defendant with extraordinary diligence to hold that, in order to preserve his rights, he must demand of the court that to which he was not entitled and the court had no authority to grant. And what the power of the court upon his own motion or at the request of the prosecuting attorney was as to declaring

a mistrial, discharging the jury and proceeding anew does not appear to be for us to consider.

And if a challenge could not at this time be entertained, then it would seem that one of two things must be true: either the defendant must be held to trial by an objectionable and disqualified juror without opportunity to challenge him, or there is a mistrial. And if it is a mistrial, and another trial is necessary, the question arises whether the defendant, in order to preserve his rights, must apply for another trial in a manner and at a time different from the manner and time prescribed by law. By the Statutes of the Territory he is only entitled to apply for a new trial "when a verdict has been rendered against" him. And he is only required to make the application "before judgment is enetred; but the court or judge thereof may for good cause shown allow such application to be made at any time within thirty days after the entry of judgment."

Okla. Session Laws of 1895, p. 202 and 203.

3. Was defendant deprived of a substantial right?

The first part of the last paragraph of Section 2, Article 3, of the Constitution provides:

"The trial of all crimes, except in cases of impeachment, shall be by jury."

The Sixth Amendment recites:

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."

The Fifth Amendment provides:

"No person shall * * * be deprived of life, liberty or property * * * without due process of law."

Section 28 of the act creating the Territory recites:

"That the Constitution and all laws of the United States not locally inapplicable shall, except as modified by this act, have the same force and effect as elsewhere within the United States."

In constructing the Constitution, we look to the history of the times, and examine the state of things when it was framed and adopted.

Rhode Island vs. Massachusetts, 12 Pet. 657, 9 L. ed. 1233.

The history of the times discloses that the Constitution was framed in the light of the common law.

U. S. Wong Kim Ark, 169 U. S. 649, 42 L. ed., 890.

The "jury" mentioned in the Constitution means a common law jury, and "according to the principles of the common law" means the common law of England, and not the common law of the several States, for to undertake to interpret according to the common law of the several States with their modifications would be to make it mean one thing at one place and something different in another.

Traction Co., vs. Hof. 174 U. S. 1, 43 L. ed. 873.

Questions arose from time to time as to the application of the early Amendments and it was decided that they did not restrict the several States in legislation or legal adjudication, which holding now extends to some ten of them.

Brown vs. New Jersey, 175 U. S. 172, 44 L. ed., 119.

It follows as a consequence, although the final conclusion has not been reached without a strong and patriotic opposition, that the respective States, in accordance with their constitutions and laws, may hold one to answer a capital or other infamous crime without presentment by a grand jury; or may try him by a jury of less than twelve men; and the decisions of the courts of last resort of the several States interpreting their own constitutions and laws are binding upon the courts of the United States.

Louisiana vs. Pilsburg, 15 Otto, 278, 26 L. ed., 1090.
Hollinger vs. Davis, 36 U. S. L. ed., 986.

As a consequence to the establishment of these principles, it would seem that no decision of a State Court, and no Federal decision following a State Court in the interpretation of the State constitution or laws, can have application to a case arising under the Constitution and Laws of the United States, or Laws of this Territory.

The adoption of the Constitution superceded the laws of the Confederation, but some of them were continued in force by the Federal Congress, and among them the Ordinance of 1787, guaranteeing to the people of the Northwest Territory that they "Shall always be entitled to the benefits of the writ of habeas corpus, and of the trial by jury, of a proportionate representation of the people in the Legislature, and of judicial proceedings according to the course of the common law."

1 U. S. S., 50.

And when finally the Territories were authorized to adopt codes and the proceedings had thereunder were ratified by Congress, it was upon the express condition, "that no party has been or shall be deprived of the right of trial by jury."

18 U. S. S., 27.

The Constitution and Laws of the United States, then, guarantee to one charged with crime in this Territory an impartial trial by a common law jury, and expressly withhold from the Territorial Legislature authority to pass any law conflicting with such right.

Since these provisions of the Constitution particularly relate to criminal trials, it may be that the right may be denied in a civil cause, since we have an instance where a verdict was rendered by nine jurors, under the instructions of the court, no exception however being saved, and the case was affirmed in this court.

Halloway vs. Dunham, et al., 170 U. S., 615, 42 L. ed., 1165.

"All male citizens * * * who have not been convicted of a criminal offense punishable by imprisonment in the penitentiary * * * are and shall be competent persons to serve on all * * * juries within their counties."

Okla. S. Sec. 3093.

"General causes of challenges are * * * a conviction for felony."

Okla. S. Sec. 5183.

A general cause of challenge is "that the juror is disqualified from serving in any case on trial."

Okla. S. Sec. 5182.

What we contend is that this juror was disqualified to serve in any case; that the disqualification was such that defendant is not chargeable with negligence in not having discovered it; that by the false answer of the juror he was deceived and induced to accept him; that at the time of discovering his qualification he was not entitled to challenge him under the Statute; that there was a mistrial, and that the defendant applied for a new trial within the time prescribed by law; and a new trial being refused, the effect is to deny him the right to challenge the juror, or to have a fair trial by an impartial jury.

4. Was the proceeding according to "due process of law? The defendant could not waive a constitutional right.

Thompson vs. Utah, 42 U. S. L. ed., 1061.

And the question arises whether the general disqualification of the juror, appearing at the time it did, presented to the defendant a mere statutory right or privilege which he could and did waive.

It would seem from the authorities that there are some things a defendant may waive even in a capital case. But it appears they are such things as concern him alone, such as are for his benefit, in way of privilege, and not such as are general and apply to all cases wherein persons may be accused of crime, for there is a public interest in the administration of the criminal law.

Hopt vs. Utah, 28 U. S. L. ed., 262.

The defendant is entitled to a public trial by an impartial jury, to be confronted by the witness, and not to be deprived of

his life "without due process of law." He has been tried by a jury of twelve men publicly, and confronted by the witnesses. But the question remains whether he has been tried by an impartial jury and by due process of law. What is meant by due process of law?

That the legislature may alter the common law procedure is not questioned, and to what extent is not the inquiry; but when it has done so, does not the observance of the general statutory provisions become a part of the due process of law guaranteed by the Constitution? Granting that a defendant may waive a statutory right peculiar to him in his position, as the disqualification of a juror to serve in the particular case, if he can do so, does it follow that he may waive that which is a part of the general law of the land and applicable to all men charged with crime, and an essential feature, a moral as well as legal element, of the due process of law? His right to be confronted by the witnesses is constitutional, and he cannot waive it for that reason. But his right to be personally present at all stages of the proceeding is but statutory, and he cannot waive this any more than the other. Such is the holding of this court; also of the Oklahoma Supreme Court.

Hopt vs. Utah, above cited.
Day vs. Territory, 2 Okla., 409.

In the due course of our procedure, the court qualifies the jurors; he did so in this instance. And before the parties are called upon or permitted to interrogate them, they have answered all questions necessary to show their qualifications generally to serve as jurors.

What is due process of law in a state is regulated by the law of the State. And irregularities or errors in the proceedings can only be corrected in the State Courts.

Walker vs. Sauvinet, 92 U. S. 90, 23 L. ed., 678.
Kennard vs. Louisiana, 92 U. S., 480, 23 ed., 478.

This will not apply here. We have a course of procedure prescribed by authority of Congress and which must conform to the laws as well as the Constitution of the United States. And what we claim is, the course prescribed has not been pursued;

that it was the duty of the Territory to place in the jury box men generally qualified as jurors, and, if, on the other hand, the defendant was charged with the duty of inquiring into their qualifications, such inquiry was made and false answers given; and if, without his fault, a disqualified juror was chosen and the fact discovered after it was too late to challenge him, it was the duty of the Court to discharge the jury; and if it may be said that it was the duty of the defendant to take any action, it is answered that he did so as soon as authorized and within the time prescribed by the procedure under which he was tried; and having done all that he was authorized or charged to do, and within the time fixed by law, he should be held blameless for the errors occurring upon his trial; that if the law denied him the right to challenge the juror after testimony as taken and to apply for a new trial before verdict was rendered, he was not afforded a lawful means of trial by an impartial jury, or a qualified jury, the proceeding was not due process of law, and he should have a new trial.

5. Was the juror disqualified?

No exception is taken to the language quoted in the opinion of the Oklahoma Court, that

> "At common law, and on general principles of jurisprudence, when not controlled by express statute giving effect within the State which enacts it to a conviction and sentence in another State, such conviction and sentence can have no effect by way of penalty, or of personal disability or disqualification, beyond the limits of the State in which the judgment is rendered."

Logan vs. United States, 144 U. S., 263.

But this case seems to arise upon the competency of two witnesses, one convicted in North Carolina and not having been restored to his rights, and the other in Texas and having been pardoned. And the question is one as to competency, with the jury to pass upon the credibility. And the Court appears to hold that Sec. 34 of the Judiciary Act of 1789 does not apply to criminal trials; also that Sec. 858 of the Revised Statutes, and not of those of Texas, govern, and that the national statutes permit such witnesses to testify. We are, however, unable, by the examination of the statutes accessible, to find a law providing that one

who has been convicted of a felony is a competent juror. It rests upon a different principle, and not alone the fact that his conduct and statements which in the box and jury room are not subject to impreachment and the scrutiny of twelve impartial men, as the conduct and testimony of a witness, but upon the broad ground of unfitness, and its inconsistency with the spirit of our institutions, and the rights of a law-abiding public. If one such is competent, then the whole jury may be composed of this class of men; and twelve felons freshly broken out of the penitentiary of one of the States and in hiding here, giving false answers to conceal their flight, would constitute an impartial jury, and a trial before them be due process of law; notwithstanding from the time of making their false answers and the discovery of the fact they would be at the mercy of the prosecuting officer.

But the Oklahoma Statute does not limit the disqualification to a conviction under the laws of the Territory, but generally to "a conviction for felony." On principle and in the nature of things it intends to cover all felons, for it goes to a class found everywhere. Given another interpretation, two men living side by side, having been convicted by the same jury and for similar criminal acts, and sentenced by the same court for the same term, one to the United States penitentiary under the United States laws and the other to the Territorial prison under the Territorial laws, and one would be a qualified juror and the other not; or a man convicted of the most heinous crime, not capital, known to the United States laws would be competent while one convicted of the felony involving least moral turpitude under the Territorial laws would be incompetent. Perhaps the legislature might enact such an unreasonable law, but what we contend is, it has not done so, and that the juror was disqualified; that his disqualification was general; that the public is interested, and the duty to try him by jorurs not felons and false-swearers rests upon the same principle as the duty to see that he was personally present at all stages of the proceeding, and with greater reason; and that, while he may have been able to waive a disqualification to serve in the particular case, as a personal privilege, he did not and could not waive the general disqualification or nullify the general law.

6 Could defendant waive the disqualification?

That there are disqualifications which amount but to ground

of exemption or of challenge is decided by this court.

Kohl vs. Lehlback, 40 U. S. L. ed., 435.

That case presented the question as to whether a statute of the State of New Jersey providing that no exception to a juror on account of his citizenship, or age, or any other legal disability, shall be allowed after he has been sworn, is consistent with the Constitution of that State.

The Court observes that nothing is said as to when the disqualification of the juror, consisting in his being an alien, as alleged, came to the knowledge of the petitioner; and that the truth of his want of citizenship may have been determined in the State Court, and that if the constitutional question had been presented to the State Court and determined adversely to petitioner, this Court saw no reason for declining to be bound, and that no reason appears why the question might not still be presented to the State Court.

As we understand the rule, this court would feel bound by the decision of the State court of last resort in such case whether favorable or not to the petitioner. And the case at bar does not appear to present the constitutionality of the Statutes of Oklahoma, but rather their construction; or perhaps the constitutionality if construed as by the Territorial Court.

The Oklahoma Statutes appear to refer to four classes of persons in connection with the formation of juries.

1. Persons possessing the qualification of electors, etc., and who have not been convicted of felony, are competent on all juries.

2. Persons possessing these qualifications and above the age of sixty years or public officers, etc., are competent unless they excuse themselves.

3. Persons possessing these qualifications but belonging to fire companies are competent, but may be excused by the court. Sec. 3093.

4. Persons possessing these qualifications and not biased or related to the parties in the particular case.

These distinctions do not amount to a classification, but enable easy explanation of the course of procedure.

The first three divisions refer to the general qualifications of jurors for service, and the manner of forming juries. The Court inquires of them. It is done when forming the jury for service in all cases or in the particular case, but usually when no particular litigant is present or in mind. A want of qualification or a disqualification being discovered, the juror is excused without consulting litigants. An exemption being claimed by one of the class numbered 2, he is excused as a matter of legal right it he elects to be. Litigants are not consulted. Those of the class numbered 3 may ask to be excused and the court acts in his discretion.

But in the remaining instance the juror has passed the examination by the court, and, if exempt, has waived the exemption; and if exempt in the discretion of the court has waived it or it has been denied, and is here challenged by one of the parties because objectionable as a juror in the particular case.

Okla. S. Sec. 5182.

It is no doubt true that if a juror has failed to disclose a disqualification for general service as a juror when interrogated by the Court, either party may call attention to it and have him excused. But in the case at bar the juror Harper qualified himself before the Court, and there was no occasion for the parties to inquire of him.

The Statute does not in providing for the formation of juries generally, Sec. 3093, provide that this and that shall be cause for challenge, etc., but that they must possess these qualifications and not be subject to this disqualification in order to be competent.

"Convicted of a criminal offense punishable by imprisonment in the penitentiary," Sec. 3093, and "a conviction for felony," Sec. 5183, enter in, not as referring to time or place, but as to the simple fact as commonly understood, and stand not as a want of qualification, as a neglect to acquire citizenship or the want of sufficient age, but as a *disqaalification*. It is not a want of qualifying attributes, a technical deficiency unassociated with moral delinquency, but a positive disqualification because of criminality.

Now, we find in the opinion in the case of Kohl vs. Lehlback above referred to the expression "positive disqualification" as distinguished from "ground of exemption or of challenge." We find this distinction made and language used in other cases, and are led to believe that it is not meaningless, although we have been unable to find where any court has undertaken specifically to define the distinction between simple ground of challenge and a positive disqualification. The disqualification may be a ground of challenge the same as a lack of qualification; but it seems that if such a distinction exists it must be more than a ground of challenge; that it is not limited to the right of a litigant at his request to have the juror excused, but includes the duty of the court at the behest of the law to exclude him; and that the parties cannot, by waiver or otherwise, enter into a compact, in effect, whereby such a person may lawfully sit, any more than they can make an agreement contrary to law in any other respect.

And since this distinction is so frequently mentioned, and particularly since it is referred to by this Court, we conclude that it must in fact exist, although not, as far as we can discover, clearly set forth, we feel justified in inquiring whether conviction of felony is not a "positive disqualification."

Not to be prolix, but specific, if such thing as a "positive disqualification" exists, it must consist of something set down in the books. To be a female, to be under twenty-one, to be above sixty, to be a minister, to be a public officer, to be a school teacher, to belong to a fire company, to be an attorney, to be licensed to sell liquor, to not be an elector, to be of unsound mind; which of these is a positive disqualification? Only that of insanity or idiocy can compare with criminality in unfitting one for jury service. And we think, too, that it is incompatible with the spirit of our institutions that one charged with crime, presumed to be innocent, although he may, and if guilty in fact would at least sometimes prefer it, shall be tried by a jury of felons; and that the interests of the public demand that he shall be tried by "good and lawful men."

Respectfully,

J. W. JOHNSON,
STILWELL H. RUSSEL,
C. B. AMES,
H. H. HOWARD,